UNP Plywood Sdn Bhd v Sabah Forest Industries Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–261 OF 2007
GOPAL SRI RAM, TENGKU BAHARUDIN SHAH AND SULAIMAN DAUD JJCA
27 FEBRUARY 2008

Contract — Breach — Agreement — Agreement to fell and extract timber — Whether agreement illegal and void — Whether agreement amounted to assignment of timber licence — Whether licence agreement pursuant to s 15 of the Forest Enactment 1968

In this case the respondent was given a timber licence by the state government. The respondent engaged the appellant to fell and extract timber from a certain portion of the land in the licence in question by two agreements, which was subsequently terminated. As a result, the appellant filed an action against the respondent for breach of contract. The suit was dismissed on the sole ground that the two agreements were illegal and void because it amounted to an assignment of the respondent's licence to the appellant which was prohibited by law. The respondent's case was that the licence was issued under s 24 of the Forest Enactment 1968 ('the Enactment').

Held, allowing the appeal:

(1) Rule 3 of the Forest Rules 1969 provides that a licence issued under s 24 must be in Form I, Form IIA or Form IIB. However, in the licence in the instant case was not in any of the said prescribed Forms and therefore the court did not agree with the respondent's contention (see para 5).

(2) The rights under the licence merely conferred on the appellant the right to enter, extract and account for the timber to the respondent and there was no assignment of the licence, hence distinguished from *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 and *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 (see para 7).

(3) Based on the authorities, the agreements in the instant case did not amount to an assignment. In any event the licence issued to the

respondent by the state did not prohibit assignment in any of its clauses. Further, cl 19 of the licence held by the respondent provides for arbitration between itself and the government in the event of any dispute, a provision which is most unlikely found in a licence. Arbitration clauses are normally found in contracts or agreements. Hence there is much force in the appellant's contention that the licence was a licence agreement under s 15 and not a licence issued under s 24 of the Enactment (see para 8); *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp* [1995] 1 MLJ 401 followed.

[Bahasa Malaysia summary

Di dalam kes ini responden diberikan lesen pembalakan oleh kerajaan negeri. Responden mengupah perayu untuk menebang kayu balak dan mengeluarkan kayu balak dari bahagian tertentu tanah di dalam lesen yang dipersoalkan melalui dua perjanjian, yang kemudiannya dibatalkan. Oleh yang demikian, perayu memfailkan tindakan terhadap responden untuk kemungkiran kontrak. Guaman tersebut telah ditolak semata-mata atas alasan bahawa kedua-dua perjanjian tersebut tidak sah di sisi undang-undang dan batal kerana ia adalah penyerahhakkan lesen responden kepada perayu yang dilarang oleh undang-undang. Kes responden adalah bahawa lesen tersebut dikeluarkan di bawah s 24 Enakmen Hutan 1968 ('Enakmen').

Diputuskan, membenarkan rayuan:

(1) Kaedah 3 Kaedah-Kaedah Hutan 1969 memperuntukkan bahawa lesen yang dikeluarkan di bawah s 24 seharusnya dalam Borang I, Borang IIA atau Borang IIB. Walau bagaimanapun, lesen di dalam kes ini bukan seperti dalam Borang-Borang yang ditetapkan dan oleh itu mahkamah tidak bersetuju dengan hujahan responden (lihat perenggan 5).

(2) Hak-hak di bawah lesen hanya memberikan kepada perayu hak untuk memasuki, mengeluarkan dan bertanggungan terhadap balak kepada responden dan tidak ada penyerahhakkan lesen, oleh itu dibezakan daripada *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 dan *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 (lihat perenggan 7).

(3) Berdasarkan autoriti-autoriti, perjanjian-perjanjian di dalam kes ini tidak bermaksud penyerahhakkan. Walau bagaimanapun, lesen yang dikeluarkan kepada responden oleh negeri tidak melarang penyerahhakkan di dalam mana-mana klausanya. Selanjutnya, klausa 19 lesen yang dipegang oleh responden membuat peruntukan untuk timbangtara di antaranya dan kerajaan jika terdapat pertikaian, yang merupakan peruntukan yang tidak biasa didapati di dalam sesuatu

lesen. Klausa timbangtara adalah biasanya didapati di dalam kontrak atau perjanjian. Maka terdapat kuasa yang lebih di dalam hujahan perayu bahawa lesen tersebut adalah perjanjian lesen di bawah s 15 dan bukan lesen yang dikeluarkan di bawah s 24 Enakmen (lihat perenggan 8); *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp* [1995] 1 MLJ 401 diikut.]

Notes

For cases on agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2523–2529.

Cases referred to

Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd [1971] 2 MLJ 161, FC (distd)

Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp [1995] 1 MLJ 401, FC (folld)

Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd [1977] 2 MLJ 200, FC (distd)

Legislation referred to

Forest Enactment 1968 ss 15, 24
Forest Rules 1969 r 3

Appeal from: Civil Suit No K22–55 of 1997 (High Court, Kota Kinabalu).

Marina Tiu (Nooraihan bt Mohammad Ali with her) (Yap Chin & Tiu) for the appellant.
Norbert Yapp Chu Chon (Jayasuriya Kah & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This is a case in which the respondent was given a timber licence by the state government.

[3] By two agreements dated 28 June 1993 and 13 August 1993 the respondent engaged the appellant to fell and extract timber from a certain portion of the land in the licence in question. Later the agreement was terminated and the appellant filed an action against the respondent for breach of contract. The learned judge who heard the suit dismissed it on the sole ground that the two agreements aforementioned were illegal and void because it amounted to an assignment of the respondent's licence to the appellant which was prohibited by law.

[4] The respondent's case is that the licence in question was issued under s 24 of the Forest Enactment 1968. For this contention the respondent relied on the following endorsement at the foot of the timber licence (see at p 337 of vol 2 of the record of appeal) as follows:

> In Witness Hereof, the Director for and on behalf of the Government of the State of Sabah and empowered by Section 4 and 24 of the Forest Enactment, 1968 has hereunder set his hand on this 26th day of Oct 1990.

[5] Under r 3 of the Forest Rules 1969 a licence issued under s 24 must be in Form I, Form IIA or Form IIB. The licence here is not in any of the said prescribed Forms. It is not correct to construe the timber licence as a s 24 licence just because the director says it is signed or issued under s 24. We are therefore unable to agree with this contention of the respondent.

[6] We return now to the issue of assignment. The impugned agreements make it clear that only 4.3% of the whole area covered by the licence issued to the respondent was made the subject matter of the agreements. Further, cll 2 and 6 of the agreement dated 28 June 1993 make it clear that the respondent retains control over the felling of the timber. As far as the power of attorney is concerned, this was executed simultaneously with the agreements and is merely an adjunct to enable the appellant to extract timber.

[7] Learned counsel for the respondent has submitted that the facts of the present case are indistinguishable from those of *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 and *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200. With respect, we do not agree. In both those cases, the whole of the rights under the licence were assigned to the other party. Here the agreements do not do that. They merely confer on the appellant the right to enter, extract and account for the timber to the respondent. Of course, the appellant has a share in the profits but that does not mean that there was an assignment of the licence.

[8] In our judgment, the facts of this case are closer to those of *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp* [1995] 1 MLJ 401. In that case the Federal Court made the following observation about the fact pattern in that case:

> Upon examination of all the relevant provisions of the second agreement of 24 May 1988, we are compelled to depart from the finding of the learned judge below. From the preamble in paras (b) and (c), there is there stated the first indication as to the real intention of the parties. Because OKS No 2 (the appellant/plaintiff) 'is desirous of felling, logging and removing timber from that portion of the concession area', OKS No 2 'had agreed to engage' the contractor (Kempadang) to do the work subject to the terms and conditions in the agreement.

> The appellant/plaintiff agreed only 'to engage' Kempadang. To engage is to employ or to secure for service. By cl 1 of the said agreement, the contractor 'agrees to fell …' the timber 'subject to the reasonable satisfaction of OKS No 2 and in conformity with all the reasonable directions and requirements of OKS No 2 and …'. Upon being engaged to do the work, the contractor did not have a free hand to work the concession area. Kempadang not only must satisfy the appellant/plaintiff, it must also comply with all the directions and requirements issued by the appellant/plaintiff. To carry out the work with such conditions attached cannot be the result of an assignment. In any agreement of this kind, provisions as to indemnity there must be. (See cl 3(b)). By cl 8, the contractor is obliged to have the policies of insurance together with the receipts of premium paid ready at any reasonable time for inspection by the appellant/plaintiff. The appellant/plaintiff is entitled to terminate the 'employment of the contractor' if 'he fails to observe or perform and comply' with any of the provisions of this agreement or the main agreement (cl 10(ii)).

[9] So too here. We find that the agreements in the present instance do not amount to an assignment. In any event we would add that the licence issued to the respondent by the state does not prohibit assignment in any of its clauses. It is also pertinent to note that cl 19 of the licence held by the respondent provides for an arbitration between itself and the government in the event of any dispute. It is most unlikely to find such a provision in a licence. Arbitration clauses are normally found in contracts or agreements. Hence there is much force in the appellant's contention that the licence was a licence agreement under s 15 and not a licence issued under s 24 of the Enactment.

[10] Now, s 15 of the Enactment provides as follows:

> (1) Save as otherwise provided in this Enactment and notwithstanding the provisions of any other State law, no right of any description in or over a Forest Reserve or any part thereof shall be acquired except by virtue, and in accordance with the terms of, a licence agreement entered into by the Minister with the approval of the Cabinet or of a licence.
>
> (1A) A licence agreement entered into by the Minister under subsection (1) of this section may provide for the planting of forest or timber trees upon such terms and conditions as may be agreed.
>
> (2) Any licence agreement entered into by the Minister under this section shall be subject to any admitted rights or conceded privileges and any special conditions attaching to the Forest Reserve concerned under the provisions of this Enactment, but subject thereto, where any provision of such licence agreement is inconsistent with any provision

of this Enactment compliance with the provisions of such licence agreement shall be deemed to be compliance with the provisions of this Enactment.

[11] It is to be noted that s 15 speaks of a licence agreement and not of a mere licence. And if you examine the licence issued to the respondent in the instant case, you will find that it is in the form of an agreement. Hence, the arbitration clause to which we have already referred. Further, it is of importance to note that s 15 in the second limb of its second subsection specifically provides that a licence agreement is not to be treated as being inconsistent with the Enactment though its provisions conflict with those of the latter. In other words, a licence agreement may contain terms that are inconsistent with the provisions of the Enactment and yet remain valid. This clearly points to the superior status that the Enactment confers upon a licence agreement issued under s 15.

[12] For the reasons already given this appeal is allowed. The order of the High Court is hereby set aside. We grant a declaration in terms of prayer (a) of the statement of claim. We also enter judgment in the appellant's favour for damages to be assessed and remit the case to the deputy registrar of the High Court at Kota Kinabalu for assessment of damages. We make no order on the other prayers in the statement of claim. The respondent must pay the costs of this appeal and those in the court below. The deposit in court shall be refunded to the appellant.

Appeal allowed with costs.

Reported by M Sivabarathi